

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,737

UNITED STATES OF AMERICA

v.

WATSON W. STIPP, Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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BRIEF FOR APPELLANT

ISSUES PRESENTED FOR REVIEW

1. Whether the pre-trial identification of appellant by the witness Ahalt was made under circumstances which violated due process of law.

2. Whether the pre-trial photographic identifications of appellant by the witnesses Gaul, Singletary and Brooks were subject to per se exclusion from evidence because made without appellant's being

Note: This case has not previously been before this Court.

represented by counsel.

3. Whether the pre-trial photographic identifications of appellant by the witnesses Gaul, Singletary and Brooks were made under circumstances which violated due process of law.

4. Whether the erroneous admission of identification evidence requires a new trial.

5. Whether the trial court's instruction that fear for the safety of a victim's family, as opposed to fear for his own safety, satisfied the "putting in fear" requirement of the robbery statute was erroneous.

6. Whether the omission from the trial court's instruction on entering with intent to rob of an essential element of robbery, namely, force or violence or putting in fear, was erroneous and constituted plain error.

7. Whether appellant could be convicted of entering a bank with intent to commit robbery under 18 U. S. Code, Section 2113(a) and also of robbery under 22 D. C. Code, Section 2901.

REFERENCE TO RULINGS

This appeal contests the following rulings of the trial court:

(1) The ruling that evidence of identification of ap-

pellant by the witness Ahalt was admissible. (Tr. B-2, p. 185) ^{1/}

(2) The ruling that evidence of identifications by the witnesses Gaul, Singletary and Brooks was admissible. (Tr. B-2, p. 187)

(3) The denial of appellant's objection to the trial court's instruction that fear for the safety of one's family would satisfy the "putting in fear" aspect of the robbery statute. (Tr. K, pp. 1053-1054)

^{1/} The transcript of the trial proceedings in this case consists of six volumes, involving several different reporters and more than one number sequence. The following table describes each volume and sets forth the designation under which it is referred to in this brief:

<u>Date</u>	<u>Reporter</u>	<u>Page Numbers</u>	<u>Designation in this Brief</u>
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STATEMENT OF THE CASE ^{2/}

On August 30, 1967, an indictment was returned against appellant in the United States District Court for the District of Columbia, charging him with entering the City Office Branch of the American Security and Trust Company on or about June 23, 1967, with intent to commit robbery therein in violation of Title 18, Section 2113(a) of the United States Code (count one), with taking money belonging to and in custody and control of the bank in violation of Title 18, Section 2113(a) of the United States Code (count two), and with robbery in violation of Title 22, Section 2901 of the District of Columbia Code (count three). Appellant pleaded "not guilty". A jury trial was held before Judge Leonard P. Walsh on December 3, 4, 5, 6 and 9, 1968, and the jury returned a verdict of guilty on count one and count three, count two having been dismissed on motion of the Government prior to submittal of the case to the jury. On January 24, 1969, appellant was sentenced by Judge Walsh to a prison term of from four to twelve years on the entering count, and from three to twelve years on the robbery count, the sentences to run concurrently.

^{2/} The principal issues in this case relate to the circumstances of pre-trial identifications of appellant. The Statement of the Case is necessarily lengthy because it recites in some detail the facts concerning those circumstances. The Court may find it helpful to read the "Summary of Argument", pp. 24-26, infra, before reading the Statement of the Case.

Prior to the jury being impanelled, a hearing was held on December 2 and 3, 1968 before Judge Walsh on (1) the admissibility of evidence relating to an identification of appellant by the bank branch manager, James B. Ahalt, (2) the admissibility of evidence relating to a photographic identification of appellant by three bank employees, and (3) the admissibility of certain statements allegedly made by appellant. Following the hearing, Judge Walsh ruled the identification evidence admissible, but excluded the statements. (Tr. B-2, pp. 185, 186, 187, 193-A) ^{3/}

Testimony Before The Jury Was Impanelled

Special Agent John A. Jones testified as follows: About 4:30 in the afternoon on July 19, 1967, he went to the Grog and Tankard Bar, 2408 Wisconsin Avenue, N. W., Washington, D. C., following receipt by the F.B.I. of information from an official of the Security Bank that the latter had been instructed to leave a parcel of money at that bar. (Tr. B-1, pp. 52, 54) After the bank official left an attache case allegedly containing money with the barmaid at the Grog and Tankard, he reported to Jones that he overheard a man, whom Jones identified as appellant, talking in the bar whose voice sounded like that of the man who had called him on the telephone. (Tr. B-1, pp. 52-53) Jones and Special Agent Dowling then sat down

^{3/} See footnote 1, p. 3, supra.

with appellant at the bar for some thirty minutes until appellant spilled his drink and the barmaid refused to serve him another. (Tr. B-1, pp. 53-54) At appellant's suggestion, Jones and Dowling left the Grog and Tankard with appellant and went to the Peacock Restaurant, where Jones and appellant had a beer at the bar and where they were joined by Special Agent McDermott. (Tr. B-1, pp. 55, 63) While at the bar, appellant became suspicious of the Special Agents and they identified themselves to appellant. (Tr. B-1, pp. 55, 65) Appellant agreed to talk with them, and Jones and McDermott walked to a booth in the corner and appellant identified himself. (Tr. B-1, pp. 56, 65) The Special Agents discussed with appellant the alleged extortion attempt of the Security Bank and told him that the bank official had recognized his voice. (Tr. B-1, pp. 56, 68) Two or three agents joined the persons at the booth at various times. (Tr. B-1, pp. 57, 62) Later in the evening Jones saw Special Agent Hugh G. Berry at a table with others, including a man later identified to him as Ahalt. (Tr. B-1, pp. 58, 66) At one point Jones saw appellant looking in Ahalt's direction and waving at him. (Tr. B-1, p. 59) Subsequently, Ahalt came over to the booth at which Jones and another agent were sitting with appellant, sat there for a few minutes, and then left. (Tr. B-1, p. 58) Jones was with appellant continuously until 10:00 P. M., and during the five hours from 5:00 to 10:00 o'clock he talked with appellant about the attempted extortion of the Security Bank and

about appellant's whole life. (Tr. B-1, p. 68)

Special Agent Hugh G. Berry testified that he went to the Peacock Restaurant about 6:00 P. M. on July 19 in connection with the attempted extortion of Security Bank and observed appellant sitting in a booth with agents Jones and McDermott. (Tr. B-1, pp. 16-17, 18) He and another agent concluded that appellant resembled an artist's conception drawing of the person who robbed the American Security and Trust Company on June 23rd. (Tr. B-1, pp. 36-38) After a number of unsuccessful efforts, beginning about 6:30 P. M., he reached Ahalt on the telephone, and Ahalt arrived at the Peacock Restaurant about 7:30 P. M. (Tr. B-1, pp. 7, 19) Berry met Ahalt outside the restaurant and instructed him to go into the restaurant, look at everyone and see whether he could recognize the individual who robbed him on June 23rd. (Tr. B-1, pp. 20, 21) He and Ahalt then went into the restaurant, where they sat at a table near the center. (Tr. B-1, pp. 8, 21) After looking completely around the restaurant, Ahalt observed the booth where appellant was sitting and said that appellant "looks real familiar" and "like the fellow who robbed me". (Tr. B-1, pp. 8, 21, 22) On cross-examination, Berry testified that Ahalt said that appellant "resembled the fellow who had robbed him". (Tr. B-1, p. 23) There were 75 to 100 persons in the restaurant at the time; appellant was sitting in the booth with Agents Jones and McDermott, both of whom were dressed in suit coats with ties and neither of whom looked like appellant. (Tr. B-1, pp. 8, 22, 36)

Berry asked Ahalt whether he would like to get a closer look at appellant and Ahalt said he would. (Tr. B-1, pp. 10, 23) Berry took Ahalt over to the booth where appellant was sitting and indicated to one of the agents there that Ahalt was going to sit at the booth for a while. (Tr. B-1, p. 23) Ahalt stayed at the booth with appellant and the Special Agents for what seemed to be 5 to 10 minutes. (Tr. B-1, p. 46) After Ahalt got up from the booth and spoke with Berry, Ahalt stated that he was positive that it was appellant who had robbed him. (Tr. B-1, pp. 11, 47)

Special Agent Dowling testified that he was sitting at a table in the Peacock Restaurant when Berry called Ahalt in, that Berry told Ahalt to look around and see if he saw anyone he recognized and that, after Ahalt looked around, he looked towards the booth where appellant was sitting and he said, "There is a fellow I think I recognize". (Tr. B-2, pp. 78, 79) On cross-examination, Dowling testified that, "To the best of my recollection, he (Ahalt) could not make up his mind at the time, the lighting was not so good". (Tr. B-2, p. 89) On both direct and cross-examination, Dowling testified that Berry asked Ahalt whether he wanted a better look and that, after Ahalt answered in the affirmative, Ahalt went over to the booth where appellant was seated. (Tr. B-2, pp. 79, 89) Appellant had on a blue coat like a blazer and light shirt and Berry did not recall appellant wearing a tie. (Tr. B-2, p. 87) The agents at ap-

pellant's booth had on business suits and ties, and neither agent resembled appellant. (Tr. B-2, pp. 87, 88) Dowling placed the time at which Ahalt went to appellant's booth at around 7:00 o'clock and the time during which Ahalt stayed there at five minutes. (Tr. B-2, pp. 89, 90) He also testified that Ahalt came back to a table where he and Agent Dowling were sitting at about 7:10 or 7:15 and that Ahalt then stated positively that appellant was the man who robbed him on June 23rd. (Tr. B-2, p. 90) Appellant was not placed under arrest until some two and one-half hours after such identification was made (Tr. B-2, pp. 90, 91)

James B. Ahalt testified that he was manager of the City Office of American Security and Trust Company at 1612 K Street, N. W., and that on June 23, 1967, at about 4:25 P. M. a man approached his desk with a note demanding \$40,000 and reflecting a threat against Ahalt's family unless Ahalt gave him the money. (Tr. B-2, pp. 99, 112) The man threw back his coat as though reaching for a gun, stated he had a gun and indicated that he was holding Ahalt's family. (Tr. B-2, p. 99) Ahalt's main concern was the safety of his family and that was the reason he turned over the money. (Tr. B-2, p. 112) He had first to check with the head teller to see that the money was available in that quantity before he could tell the man that the money could be given to him. (Tr. B-2, p. 100) While he was gone to check with the head teller, the man continued to sit at the customer's chair at his desk. (Tr.

B-2, p. 100) A total of four to five minutes elapsed between the time the man appeared at his desk and the time he gave the man the money and walked him to the door. (Tr. B-2, p. 99)

With respect to the events of July 19th, Ahalt confirmed the substance of Berry's testimony concerning the telephone call, his arrival at the Peacock Restaurant and Berry's instructions. (Tr. B-2, pp. 101, 102) After looking around the restaurant, containing some 75 to 100 persons, he noticed appellant in the booth with some other gentlemen. (Tr. B-2, pp. 102, 103) He told Berry that appellant looked like the man who held him up at the bank. (Tr. B-2, p. 103) When he looked again at appellant, appellant acknowledged his glance with a wave. (Tr. B-2, p. 103) Berry asked whether he wanted a closer look and indicated he could, with safety, go over where appellant was seated because appellant was with Federal Bureau of Investigation Special Agents. (Tr. B-2, pp. 103-106, 114) Ahalt was accompanied to appellant's booth by two officers. He forgot the exact way that he was presented -- "I was with them, not implying that I was an agent, but he knew he was sitting with agents at that time, but my recollection is they said something about I was in some financial business without identifying that as being in the banking business, and they asked him if he had ever seen me before, and which he declined and said no". (Tr. B-2, pp. 104-105) (Tr. B-2, p. 114) He sat opposite appellant and he talked with appellant for five to ten minutes.

(Tr. B-2, p. 115) He then returned to the table where Berry and other agents were seated and informed them that appellant was the man who robbed him. (Tr. B-2, p. 109) He became quite positive that appellant was the man who robbed him when he sat in the booth with appellant at the Peacock Restaurant; the identification was clear in his mind, and he remembered the details as clearly as when he sat with appellant. (Tr. B-2, p. 117)

Ahalt also testified that he had seen appellant on two occasions since the night at the Peacock Restaurant, one when appellant was indicted and later in the Commissioner's office. (Tr. B-2, pp. 115-118) Subsequent to July 19, Matthews, the F.B.I. district manager, brought a photo of appellant to the bank together with the composite artist's conception so that Ahalt "could see how close he was in composite to the man actually". (Tr. B-2, pp. 120, 121)

Appellant, Watson W. Stipp, testified that before he arrived at the Grog and Tankard Bar on July 19th, he had been drinking heavily, including half a fifth of vodka before he left his house and three vodka martinis at a restaurant on Connecticut Avenue, and that he had no recollection of leaving the Grog and Tankard Bar at any time. (Tr. B-2, pp. 158-162) He recalled very vaguely a conversation with Ahalt which he thought took place at the Grog and Tankard. (Tr. B-2, p. 163) The thing that stood out in his mind was that the F.B.I. agents asked him whether he

knew anyone in the room and, in looking around, he stopped at a front table where he had seen the agents going back and forth and one of the agents asked if appellant knew Ahalt, who was looking directly at appellant. (Tr. B-2, p. 163) Appellant said "No". (Tr. B-2, p. 163) Appellant further testified that he had never seen Ahalt. (Tr. B-2, p. 175)

F.B.I. Special Agent Gallagher testified that on July 21, 1967, he showed five photographs, including a photograph of appellant, to Elizabeth B. Gaul, Mary Singletary and James Brooks, employees at the 1612 K Street branch of the American Security and Trust Company. (Tr. B-2, pp. 123-125) He told each of them that "we had a suspect" and that they should look at the photographs and see if they could identify the person who robbed the bank on June 23rd. (Tr. B-2, pp. 125, 126) He testified that each stated that of the five photographs, the photograph of appellant more closely resembled the bank robber. (Tr. B-2, pp. 125, 126)

Mrs. Gaul testified that she saw Ahalt and a gentleman walk out of the bank together, the gentleman carrying a brief case. (Tr. B-2, p. 130) She did not see Ahalt and the man walking out of the bank, but she saw the man "sitting at a chair at the rail". (Tr. B-2, p. 133) Of the five photographs, she selected one because the "grey hair, the wide face, and the features seemed to be right". (Tr. B-2, p. 131)

Mrs. Singletary testified that she just happened to look up from her window and saw a gentleman walking out with Ahalt. (Tr. B-2, p. 137) She never saw this individual fully, but only his left side. (Tr. B-2, p. 141) Of the five photographs shown to her she picked out one that most resembled the individual she saw with Ahalt, the resembling characteristics being the hair and the shape of the head. (Tr. B-2, p. 141) On an earlier date she had picked out a picture other than that of appellant as the man most resembling the robber. (Tr. B-2, p. 142) She referred to a statement which she had given the F.B.I., and defense counsel informed the Court that it appeared from the statement that "all three of them picked the photograph of Robert Van Lewing as having some resemblance to the subject who robbed the bank June 21, 1967". (Tr. B-2, pp. 142, 143)

Mr. Brooks testified that on June 23, 1967 he did not see anyone in the company of Ahalt but that he saw a man walking back to his desk and that he saw more or less of a profile of the man's face. (Tr. B-2, pp. 152, 153) He testified that of the five or six photographs shown to him, he selected one as mostly resembling the man he had seen on June 23rd. (Tr. B-2, pp. 150-151) Brooks stated that he was not positive appellant was the same man whom he saw on June 23rd, but he looked a lot like him. (Tr. B-2, pp. 154, 155)

Testimony After The Jury Was Impanelled

The Government's Case

Ahalt substantially repeated his earlier testimony regarding the events of July 19th, and identified appellant as "the person here today who did this holdup". (Tr. B-3, pp. 241, 249-254, 268-272) Jones and Dowling testified concerning certain of the events occurring on July 19th. (Tr. M, pp. 47-60, 61-70)

With respect to the events at the Peacock Restaurant, Ahalt also testified (B-3, pp. 271-272):

"Q Everyone was getting up and sitting down?

A I wouldn't say that; I would say that everyone was pretty well seated for an evening's festivity.

* * *

Q What about patrons where you were sitting: were they coming and going, getting up and sitting down?

A There was an exchange; either someone got up from my table and went to the one Stipp was sitting at, or vice versa; I don't know".

Ahalt amplified to some extent upon his earlier testimony concerning the events of June 23rd at the bank.

Concerning the statements made by the man who approached his desk at the bank, Ahalt testified (Tr. B-3, pp. 243-244):

"Q What did Mr. Still (sic) say or do to you?

A He made some comment about my daughters: I don't know whether he was trying to convey to me that he had my daughters but it was easy to understand -- or he lead me to believe, at that point, that he was actually holding my family as hostages because no one would know I had daughters unless they had checked into my family background.

At that point I said, 'Well, I will see what money we have available' * * * . I told him I would have to check what we had and went over to the Head Teller's cage and ascertained that she did have \$40,000 in one hundred dollar bills.

Q Where was the defendant, Mr. Stipp, at the time you went to the teller's cage?

A He was still at my desk".

On cross-examination, defense counsel pursued the subject (Tr. B-3, pp. 259-260):

"Q And then there came a time in your conversation in which your daughter or daughters were mentioned, is that right?

A Yes.

Q And then you felt that this man may have been serious?

A He so indicated.

Q And it was for the safety of your family that motivated you to act?

A Right.

Q Now, no threat was made against you, personally?

A Except when a man reaches for a gun, that is not exactly without threat, is it?

Q Well, he merely said, "I have a gun", is that right?

A He said he had a gun and he started to reach for it.

Q Now, did he ever say that anything was going to happen to you, personally?

A No".

On redirect examination, Ahalt stated (Tr. B-3, p. 281):

"Q You were asked on cross examination if you went to the cashier and got the money for fear of harm to your family; was it fear of harm to yourself by Mr. Stipp as well?

A That would have been a collateral factor, yes.

Q You felt that he was armed, an armed man who might use the gun on you if you didn't do what you were told?

A That's right".

Then on recross-examination (Tr. B-3, p. 282):

"Q You never saw a gun, did you Mr. Ahalt?

A No, sir.

Q You did not know for a certainty that he had a gun except for the statement, 'I have a gun'?

A plus the gesture of reaching for a gun.

Q What did you do, at that time?

A At that time, I got out of my chair and left my desk to go to the head teller and ascertain the availability of the money.

Q There no further talk after that about a gun?

A Right".

Special Agent Gallagher, over defense objection, substantially repeated his previous testimony, stating that each of the three persons to whom the five photographs were shown selected the photograph of appellant as that "which most resembled the person who committed the robbery". (Tr. B-3, pp. 286-288) None of the five photographs contained the picture of Van Lewing. (Tr. B-3, 290-291)

Asked whether they saw in the courtroom the person they saw in the bank on June 23, 1967, Mrs. Gaul said (Tr. B-3, p. 295): "I couldn't say positively"; Mrs. Singletary said (Tr. M, pp. 12-13): "Someone that resembles him", pointing towards appellant; and Mr. Brooks said (Tr. M, p. 26): "I see the defendant, who looks a lot like the person that I saw. I am almost sure".

Each of the three bank employees testified to an unawareness of anything unusual happening on June 23rd until subsequently informed that a robbery had occurred. Mrs. Gaul testified that she "saw Mr. Ahalt walk out the front door with a gentleman

I did not know" and also that earlier she "just happened to glance around" and saw a gentleman sitting at "the rail back by the officer's desk where people wait". (Tr. B-3, pp. 293-294) She also testified that when she saw the man walk out the door with Ahalt, she saw his profile. (Tr. B-3, p. 299) Mrs. Singletary testified that she "noticed a gentleman walking out of the bank with Mr. Ahalt", that "I just got a glimpse of him as he went by", and that she saw the man's "profile". (Tr. M, pp. 10, 22) Mr. Brooks testified that he saw the man walking with Ahalt "For just an instant" and that "I saw most of his face - all of it, I would say". (Tr. M, pp. 34-35) Gaul, Singletary and Brooks each testified that of the five photographs shown to them by Special Agent Gallagher each selected a photograph which resembled the man they saw at the bank on June 23rd. (Tr. B-3, p. 296, Tr. M, pp. 16, 30) Mrs. Gaul also testified that all of the five photographs, except that of appellant, show the profiles. (Tr. B-3, p. 301) She further testified that she recalled the man in the bank as having gray hair and picked out the man as having gray hair and that she did not see any other men in the pictures who had gray hair. (Tr. B-3, p. 297) When shown the five photographs at the trial, Mrs. Gaul and Mrs. Singletary each pointed out the photograph of appellant as that which she had picked out when the photographs were shown by Agent Gallagher. (Tr. B-3, pp. 296-297, Tr. M, p. 18) Mr. Brooks testified that he did not select any of the photographs shown at the trial. (Tr.

M, pp. 30-31)

F.B.I. Agent Warren W. Matthews testified that in connection with his participation in the investigation of the robbery on June 23rd, he showed certain photographs and a composite drawing of the person who committed the robbery to Mrs. Singletary and to two other bank employees. (Tr. M, pp. 80-81) Each selected a photograph of Robert Van Lewing as resembling the person who committed the robbery. (Tr. M, pp. 79-81) Van Lewing was arrested on February 7, 1967 at Kansas City, Missouri, and was in custody until he was received at Leavenworth Prison on June 23, 1967. (Tr. M, p. 80)

Nick Dean testified that he was an air taxi owner and pilot who operated a charter service out of Fort Lauderdale, Florida. (Tr. B-2, p. 195) Following a request radioed his office on July 2, 1967 for air transportation for a Mr. James Cadwell, he flew to Bimini, where he met and made financial arrangements with Cadwell, whom he identified as appellant, for a charter flight from Bimini to Freeport and then to Fort Lauderdale. (Tr. B-2, pp. 196-198) These arrangements involved a payment of approximately \$400, which was paid to him in advance with four \$100 bills. (Tr. B-2, p. 199) At the casino in Freeport, appellant purchased approximately \$9,000 worth of chips with \$100 bills and, after losing these at the crap table, purchased approximately the same number of chips from the proceeds of a check cashed at the casino. (Tr. B-2, pp. 199-200) Appellant also lost these and additional chips purchased with \$400

loaned by Dean and with the proceeds of a second check which he cashed. (Tr. B-2, pp. 200-202) In connection with the money owed by appellant to him for the charter services and repayment of the \$400 loan, after the flight from Freeport to Fort Lauderdale on July 3, 1967, Dean, with appellant's permission, took possession of four pieces of luggage which contained, among other items, a coat which Dean identified at the trial. (Tr. B-2, pp. 204, 208-209)

With respect to the coat worn by the alleged robber on June 23rd, Ahalt described it as a "dark green jacket" (Tr. B-3, p. 266); Mrs. Gaul, as a "yellow-green jacket" (Tr. B-3, p. 295); Mrs. Singletary, as a "green sports coat" (Tr. M, p. 10); and Mr. Brooks, as a "light green sports coat". (Tr. M, p. 27) Ahalt, Gaul and Singletary each testified that the coat marked as Government Exhibit No. 1 was shown to them prior to the trial. (Tr. B-3, pp. 266, 295; Tr. M, p. 11) Asked whether he or she could identify Government Exhibit No. 1 as the coat worn by the alleged robber on June 23rd, Ahalt testified (Tr. B-3, p. 248), "I believe this to be the sports coat that the suspect had on his person at the time of this robbery"; Mrs. Gaul said (Tr. B-3, p. 295), "It could be"; Mrs. Singletary said (Tr. M, p. 12), "No, Sir"; and Mr. Brooks said (Tr. M, p. 28), "I couldn't definitely say, no, Sir".

At the close of the Government's case, defense counsel moved for a judgment of acquittal, which was denied. (Tr. M, p. 89)

The Defense Case

Appellant, Watson W. Stipp, took the stand in his own behalf and denied having been at the bank on June 23, 1967 or ever having seen Ahalt prior to July 19, 1967. (Tr. M, pp. 108, 118) About 11:00 o'clock, and not later than 11:30, on the morning of June 23, 1967, he left Washington with a person he had met once before and went to the Delaware Park racetrack north of Baltimore. (Tr. M, pp. 108-109) After leaving the racetrack he got a haircut in Baltimore, registered at the Sheraton Hotel, took in a show, went to a restaurant, and after staying over night in Baltimore took a plane to Chicago in order to see a horse, which he had been following, run at the Arlington Park racetrack. (Tr. M, pp. 110-115) Appellant substantially repeated his previous testimony concerning the events of July 19 at the bar and restaurant, making more explicit his earlier suggestion that one of the agents had attracted Ahalt's attention to his table by pointing to Ahalt's table. (Tr. M, pp. 117-118)

On cross-examination, appellant stated that he left the Delaware Park racetrack by cab with the person with whom he went there and was let out at a shopping center where he got the haircut and that he also went to a men's clothing store but that he could not recall whether this was before or after he registered at the hotel. (Tr. M, pp. 124-125) He had started out from Washington with approximately \$730 and as a result of his winnings at Delaware Park racetrack he arrived in Chicago with approximately \$3,000. (Tr. M, pp. 125-126) After leaving Chicago he went to Miami, where

he chartered a fishing boat and fished off Florida and then at Bimini. (Tr. M, p. 129) At the Lucaya Beach casino he won \$8,500 at the crap table and an additional \$19,000 at the blackjack table. (Tr. M, pp. 142-143) At the time he met Nick Dean he was ahead gamblingwise, less expenses, approximately \$25,000, which was in denominations of twenties, fifties and mostly one hundreds because he was betting one hundred dollar chips; he eventually lost the entire amount. (Tr. M, pp. 144-146)

On redirect examination on Monday, December 5, 1968, appellant identified a sales slip, Defendant's Exhibit No. 1, reflecting the purchase by him on June 23, 1967 from a men's store in the Pikesville Shopping Center of a sport coat, a pair of slacks, a shirt, a tie and a tieclip. (Tr. H, pp. 903-905) He placed the time of the purchase as "between four-thirty, and say quarter after five at the latest". (Tr. H, p. 905) On re-cross examination, as to the time, appellant testified (Tr. H, p. 905):

"Well, when I was in the barbershop prior to going in this men's store, I know at that particular time, it was prior to five o'clock. That is why I can't be exactly accurate as to the time I made this purchase."

James A. Eby, testified that in June 1967 he was employed in the Men's Shop in the Pikesville Shopping Center and that Defendant's Exhibit No. 1 represented a salescheck for merchandise sold by him on June 23, 1967 in the total amount of \$66.10. (Tr. H, pp.

908-912) On the basis of the cash register tapes the sale took place on June 23rd "between four and six o'clock" and "six-thirty would be absolutely the last". (Tr. H, p. 912) Eby did not recall the person to whom the merchandise was sold or the circumstances of the transaction, except that the purchaser wanted the pair of slacks already cuffed since he was in a hurry and that the merchandise was paid for with a hundred dollar bill. (Tr. H, pp. 909-910)

Defense counsel renewed his motion for judgment of acquittal, which was denied. (Tr. H, p. 925)

The summations of both counsel and the court's instructions framed the issue of the identity of the person who was in the bank on June 23, 1967, as the key issue in the case. The jury was also instructed with respect to the essential elements of the offenses charged in the first and third counts of the indictment and that the second count had been withdrawn.

With respect to the first count, the court instructed that the essential elements of the offense charges were (1) that "the Defendant entered the premises of the bank * * * " and (2) that "at the time of such entry the Defendant acted with the specific intent to commit robbery, that is, to take from the person or from the presence of another any property or money or other thing of value belonging to or in the custody or in the care or the control or the management of the bank". (Tr. K, p. 1041) With respect to the third count, the court instructed that the "putting in fear" element of the robbery statute could be satisfied by fear for one's own

safety or the safety of one's family. (Tr. K, p. 1045) The court overruled the objection of the defense counsel to this instruction. (Tr. K, pp. 1053, 1054)

SUMMARY OF ARGUMENT

There are four separate issues in this appeal, the first of which has several facets.

(1) The first issue relates to the identification of appellant as the perpetrator of the crime. Appellant's defense was that of alibi. The bank manager, Ahalt, identified appellant in a restaurant, prior to his arrest, under circumstances which appellant contends were unfairly suggestive and violated due process. Appellant therefore contends that evidence of this identification, and Ahalt's in-court identification of appellant, should have been excluded. In addition, three bank employees identified appellant's picture two days after arrest at a time when appellant was not represented by counsel and under circumstances which appellant contends were unfairly suggestive and violated due process. Appellant therefore contends that evidence of these identifications, and in-court identifications by the bank employees, was erroneously admitted. Finally, appellant contends that these erroneous admissions of identification evidence require a new trial, since the Government cannot sustain its burden of proving harmless error.

(2) The trial court, over objection, instructed the jury

that the "putting in fear" element of the robbery statute could be satisfied by fear for the safety of one's family, as opposed to fear for the safety of oneself. Appellant contends that this instruction was erroneous because fear for the safety of one's family does not satisfy the requirements of this aspect of robbery under the common law or under the D. C. robbery statute.

(3) The trial court's instructions to the jury on the essential elements of the crime of entering a bank with intent to rob defined robbery in terms which omitted any reference to a taking by force or violence or by putting in fear. Appellant contends that since the jury was never given a complete and proper instruction on the elements of robbery, this omission was "plain error" which entitles appellant to a new trial.

(4) Appellant was convicted of entering a bank with intent to commit robbery, under 18 U. S. Code, Section 2113(a), and also of robbery, under 22 D. C. Code, Section 2901. The Supreme Court of the United States has held that the crime of entering a bank with intent to commit a crime under 18 U. S. Code, Section 2113(a) applies only where the person entering the bank with such an intent fails to complete the crime. Appellant therefore contends that having been convicted of robbery, he could not also be convicted of entering with intent to commit robbery.

ARGUMENT

I. THE EVIDENCE IDENTIFYING APPELLANT AS THE PERPETRATOR OF THE ALLEGED CRIMES WAS IMPROPERLY ADMITTED, ENTITLING APPELLANT TO A NEW TRIAL.

A. THE PRE-TRIAL IDENTIFICATION OF APPELLANT BY THE WITNESS AHALT WAS MADE WITHOUT THE PROTECTION OF APPELLANT'S BEING REPRESENTED BY COUNSEL, AND UNDER CIRCUMSTANCES WHICH WERE UNFAIRLY SUGGESTIVE. EVIDENCE OF THIS PRE-TRIAL IDENTIFICATION, AND OF AN IN-COURT IDENTIFICATION BY AHALT, WAS THEREFORE ERRONEOUSLY ADMITTED.

(With respect to this Argument, appellant desires the Court to read Tr. B-1, pp. 7-11, 16-18, 20-25, 58-60, 68; B-2, pp. 89-90, 101-106, 114-115, 163, 182-185; B-3, pp. 249-254, 268-272; Tr. M, pp. 117-118.)

At the opening of the trial, before the jury was impanelled, defense counsel advised the trial court that it was the position of the defense that the original identification of appellant by the bank branch manager, Ahalt, was made under circumstances which rendered it inadmissible under decisions of the Supreme Court, that any in-court identification of appellant by Ahalt at the trial should therefore be excluded, and that he wished to have a hearing to determine the relevant facts. (Tr. B-1, p. 3; B-2, pp. 182-185) Following this hearing, the trial court ruled that the pre-trial identification was proper. (Tr. B-2, p. 185) Thereafter, in the presence of the jury, there was testimony by Ahalt concerning the pre-trial identification, and Ahalt made an in-court identification of appellant. (Tr. B-3, pp. 241, 249-254, 268-272) It is appellant's position that the pre-trial identification was improper and that evidence concerning it,

as well as Ahalt's in-court identification of appellant, should have been excluded.

Recent years have seen far-reaching developments in the law pertaining to the circumstances under which evidence of pre-trial identifications of a criminal defendant is admissible. These developments began with the three Supreme Court cases decided June 12, 1967, United States vs. Wade, 388 U. S. 218, Gilbert vs. California, 388 U. S. 263, and Stovall vs. Denno, 388 U. S. 293. These three cases have been followed by a number of decisions of this Court, including an en banc decision in the three cases decided jointly under the heading Clemons vs. United States, _____ U. S. App. D. C. _____, _____ F. 2d _____ (decided December 6, 1968).

As a result of these developments in the law, it has been clearly established that evidence of a pre-trial identification of a criminal defendant is not to be admitted if (1) the identification took place following the defendant's arrest but not in the presence of counsel representing him, or (2) the circumstances of the identification were such as to be unnecessarily or unreasonably suggestive with the result that the identification lacked essential elements of fairness and thus constituted a denial of due process of law.

Pre-trial identification of appellant by the witness Ahalt took place on July 19, 1967 at the Peacock Restaurant. The circumstances were described in the testimony of Ahalt and several F.B.I. agents, summarized in the Statement of the Case at pages 5 to 11

and at page 14 of this Brief. In reviewing these circumstances, it should be borne in mind that no positive identification of appellant was made by Ahalt until he had been taken to the table in the Peacock Restaurant at which appellant was seated along with a number of F.B.I. Special Agents. Accordingly, whether the circumstances of the identification were unreasonably suggestive depends upon the events which transpired prior to that time.

The period from the time that Ahalt entered the Peacock Restaurant to the time he made the positive identification was considerable. During the first part of this period, Ahalt was seated at a table with Agent Berry, or Berry and another F.B.I. agent, while appellant was seated at a booth with Agents Jones and McDermott. (Tr. B-1, pp. 9, 59; B-2, pp. 87, 114; B-3, p. 268) The two Special Agents were dressed in business suits with ties; appellant had on a blazer-like blue sports coat without tie. (Tr. B-1, pp. 22, 87) Even at this point, therefore, the difference in dress between the Agents and appellant was suggestive, not perhaps as suggestive had appellant been seated with two police officers in uniform, but nevertheless distinguishing the occupants of this booth in the restaurant from those of the other booths. Moreover, while "everyone was pretty well seated for an evening's festivity" in the restaurant while Ahalt was present (Tr. B-3, p. 271), the situation was entirely different at appellant's booth and Ahalt's table -- in the words of Ahalt, "There was an exchange; either someone got up from my table and went to the one Stipp was sitting at, or vice versa; I don't

know". (Tr. B-3, pp. 271, 272) Ahalt having been informed that a suspect was in the restaurant by Berry, it is difficult to conceive what could be more suggestive than an exchange of F.B.I. agents between the table at which Berry and Ahalt were seated and the booth at which appellant was seated. Moreover, while appellant's recollections were vague, he gave uncontradicted testimony that one of the agents pointed to Ahalt's table and attracted his attention, and he implied that any "waving" to Ahalt by him was induced by the agent's actions. (Tr. M, p. 118) Such actions by the agent were highly suggestive.

After a period of time in the restaurant at the table with the Agents Berry and Dowling, Ahalt stated, "That fellow over there looks real familiar" and "He looks like the fellow who robbed me". (Tr. B-1, p. 8; B-3, pp. 268, 269) Dowling testified that Ahalt "could not make up his mind, the lighting was not so good". (Tr. B-2, p. 89) Berry recognized that there had been no positive identification of appellant - he asked Ahalt whether he wanted a closer look, and Ahalt said he would if it could be arranged. (Tr. B-2, p. 103) Some five minutes or so later, Berry took Ahalt over to the booth at which appellant was seated with Special Agents Jones and Ford. (Tr. B-2, p. 103) Before doing so, Berry advised Ahalt that he could go to the booth with safety as appellant was seated with F.B.I. Special Agents. (Tr. B-2, pp. 104, 105, 106; B-3, pp. 269, 270) This statement, made at a time when Ahalt had not positively identified appellant, clearly prejudiced any further efforts at identification. When Ahalt got to the booth, where he stayed for approximately fifteen minutes, appellant was asked by one of the

F.B.I. agents, during the course of what Special Agent Jones and Ahalt characterized as general conversation, whether he had ever seen Ahalt before. (Tr. B-2, pp. 104, 105) This question, asked at a time when the F.B.I. agents had just made crystal clear that they suspected appellant, could only accentuate a situation already "pregnant with prejudice". See Biggers v. Tennessee, 390 U. S. 404, 407 (1968)(dissenting opinion) and Foster v. California, _____ U. S. _____, 37 U. S. L. Week (April 1, 1969).

In the Wade and Gilbert cases, the Supreme Court adopted a per se exclusionary rule that an out-of-court identification subsequent to arrest was inadmissible, regardless of whether it was in fact suggestive or not, if defendant's counsel was not present. In so holding, the Supreme Court pushed to an earlier point in the criminal process than had previously been the case the "critical stage of the prosecution" at which a defendant must, in order to comply with the requirements of the Constitution, be represented by counsel. The reasons, as set forth by the Supreme Court in the Wade case, why the protection of counsel is needed during such a confrontation are clearly equally applicable with respect to an identification prior to arrest. Neither the Supreme Court nor, to the best of knowledge of appellant or his counsel, any Court of Appeals has yet held that a pre-trial identification prior to arrest is invalid if not made in the presence of counsel, although the Supreme Court has hinted at such an issue -- see Simmons vs. United States, 390 U. S. 377, 383 (1968). Since such a contention was not

presented to the court below, and since a failure on the part of the court below to establish new law in this field would not constitute "plain error" recognizable by this Court under Rule 52(b), Fed. Rul. Crim. Proc., appellant does not now contend that the pre-trial identification was inadmissible per se because of the absence of counsel. Appellant submits, however, that in evaluating the circumstances of the pre-trial identification from the point of view of fairness and due process of law under Stovall, this Court must take into consideration the fact that the identification was made at a time when appellant was not represented by counsel. And one important reason for requiring the presence of counsel, recognized by the Supreme Court in Wade, is so that the trial court may avoid having to speculate and resolve conflicts as to what actually happened at the identification and avoid having to categorize circumstances, after the fact, as suggestive or not. See Mason v. United States, _____ U. S. App. D. C. _____, _____ F. 2d _____ (decided June 30, 1969) It is submitted that where counsel is not present, the reviewing court should resolve doubts as to the fairness of the identification procedure in favor of the defendant.

It is appellant's position that the circumstances of the pre-trial identification as described above, taking into account the absence of counsel, were unreasonably and unnecessarily suggestive, and that the identification therefore lacked fairness and violated due process of law. Accordingly, it was error to permit the

introduction of evidence of the identification. Where testimony of an out-of-court identification held improper because of the absence of counsel is erroneously admitted, the prosecutor is not entitled to an opportunity to show that in-court identification by the same witness has an independent source. Gilbert v. California, supra; Clemens v. United States, supra, slip opinion, p. 4. The same rule applies in post-Stovall cases where the identification was improper because it violated due process. Clemens v. United States, supra, slip opinion, p. 9. Thus the in-court identification of appellant by Ahalt was also improperly admitted in evidence.

- B. THE PRE-TRIAL PHOTOGRAPHIC IDENTIFICATIONS BY WITNESSES GAUL, SINGLETARY AND BROOKS WERE MADE FOLLOWING APPELLANT'S ARREST BUT WITHOUT THE PROTECTION OF HIS BEING REPRESENTED BY COUNSEL AND UNDER CIRCUMSTANCES WHICH WERE UNFAIRLY SUGGESTIVE. EVIDENCE OF THESE AND OF IN-COURT IDENTIFICATIONS OF APPELLANT BY TWO OF THE SAME WITNESSES WAS THEREFORE ERRONEOUSLY ADMITTED.

(With respect to this Argument, appellant desires the Court to read Tr. B-2, pp. 131, 142-145, 185-187; B-3, pp. 284-288, 290-291, 297, 300-301; M, pp. 30-31, 79-81.)

At the opening of the trial, before the jury was impanelled, defense counsel asked the trial court to exclude evidence concerning pre-trial showings of photographs of appellant and others to the three bank employees, Gaul, Singletary and Brooks, and to exclude any identification testimony by these three witnesses. (Tr. B-2, pp. 185-187) The trial court declined to exclude such evidence. (Tr. B-2, p. 187) At the trial itself, Agent Gallagher testified,

over objection, that five photographs, including one of appellant, had been shown to the three bank employees on July 21, 1967, two days following appellant's arrest, and that each of them had picked out a picture of appellant as most resembling the perpetrator of the crime. (Tr. B-3, pp. 284-288) Each of the three employees gave similar evidence concerning his own identification of appellant at the pre-trial showing of photographs. (Tr. B-3, p. 297, M, pp. 16-18, 29-32) In addition, the witnesses Singletary and Brooks made some identification of appellant in-court as the person whom each had seen in the bank on June 23, 1967. (Tr. M, pp. 12, 16)

It is clear that the showing of photographs on July 21, 1967 was done after appellant's arrest and at a time when he was not represented by counsel. Moreover, the circumstances under which the photographic identifications were made by the three bank employees at that time clearly demonstrates that they were unfairly suggestive. It is appellant's contention, therefore, that evidence as to what occurred at such showings, and in-court identifications by the same witnesses, were improperly admitted in evidence.

The same considerations which led the Supreme Court to hold, in Wade, that a line-up identification after arrest must be carried out in the presence of counsel for the accused apply with equal force with respect to photographic identification after arrest; in both cases there is an inherent likelihood of a mislead-

ing or suggestive identification and in both cases there is no inherent reason for not having counsel present to observe the procedures utilized at so vital a stage in the process of conviction. It follows that just as in Wade the Supreme Court held invalid the introduction in evidence of a line-up identification made following arrest and without the presence of counsel for the accused, so this Court must now hold invalid the introduction in evidence of photographic identification made following arrest and without the presence of counsel.

It is true that in Simmons v. United States, 390 U. S. 377 (1968) and in the en banc decision in the Clemons case, the Supreme Court and this Court declined to set aside photographic identifications. In both cases, however, it is clear that the issue was conceived by the court as one of due process only, and not involving lack of the presence of counsel. ^{4/} And in both cases the photographs were shown to the witnesses prior to the defendant's arrest, at a time when a requirement that counsel be present would have posed practical difficulties and at a time when the photographic identification process

^{4/} "Simmons, however, does not contend that he was entitled to counsel at the time the pictures were shown to the witnesses. Rather, he asserts simply that in the circumstances the identification procedure was so unduly prejudicial as fatally to taint his conviction." Simmons v. United States, 390 U. S. at 383.

played a crucial role in the search for the culprit, a search which the courts in these cases were, quite rightly, reluctant to impede.

Thus, in Simmons, the Supreme Court stated that the procedure of initial identification by photograph "has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects of ignominy of arrest by allowing eye-witnesses to exonerate them through scrutiny of photographs". 390 U. S. at 382. And in Clemens this Court stated: "In the case of photographs, Simmons makes clear that only a due process (or, in the case of federal prosecutions, an appellate supervisory power) issue can be involved where the police problem is one of getting leads to possible suspects". (Emphasis supplied.) (Slip Opinion, p. 10)

There is nothing in Simmons or Clemens which suggests that a suspect after his arrest is not entitled to counsel at the time photographs are shown. Indeed, as demonstrated above, the same dangers which the Supreme Court found in Wade necessitated the presence of counsel at line-ups are equally present in photographic identifications, and the per se exclusionary rule is therefore equally essential.

Appellant further contends that the pre-trial photographic identifications by the three bank employees were made under circumstances which lacked fairness and hence which violated due process

of law. Here again, this contention should be considered in light of the absence of counsel. The circumstances of the photographic identification lacked fairness in the following respects:

(1) Each of three bank employees had, prior to appellant's arrest and shortly after the robbery, been shown photographs and asked to pick out the one which resembled the person seen in the bank on June 23, 1967. (Tr. B-2, pp. 142-143) Each picked out the picture of one Robert Van Lewing. (Tr. B-2, pp. 142-143; M, pp. 79, 81) And yet, when each of the bank employees was shown five photographs after appellant's arrest, the photograph of Van Lewing was not included. (Tr. B-3, pp. 290, 291) It is submitted that the possibility of a misidentification of appellant arising out of the unanimous choice of Van Lewing at an earlier time required that Van Lewing's picture, as well as appellant's, be included in the photographic identification subsequent to appellant's arrest.

(2) Of the five pictures shown to the bank employees, all but that of appellant showed a profile photograph, while appellant alone was shown only full face. (Tr. B-3, pp. 300, 301) Moreover, only the photograph of appellant was that of a person which appeared to have gray hair. (Tr. B-3, p. 297) The Supreme Court in the Wade case emphasizes the importance in a police line-up of minimizing obvious differences between the suspect and the others taking part in the line-up. The same assurance of fairness should characterize a photographic identification process. See Mason v. United States,

supra, page 31, (slip opinion p. 11). The marked difference in angle of view between appellant on the one hand and all of the other photographs on the other was suggestive. That the difference in the hair coloring of the persons shown in the photographs was unfairly suggestive is clear as witnesses Gaul and Singletary gave hair coloring and gray hair a reason for their selection of the photograph of appellant. (Tr. B-2, pp. 131, 141; B-3, p. 297)

For the reasons set forth above, the admission in evidence of the testimony of F.B.I. Special Agent Gallagher relating to the pre-trial photographic identification of appellant by bank employees Gaul, Singletary and Brooks and of identifications at the trial by witnesses Singletary and Brooks was erroneous. And, in view of the rule in the Gilbert and Clemens cases referred to above (see p.32), the pre-trial identification by these witnesses having been improperly admitted, it follows that the in-court identifications by the same witnesses were also improper.

C. THE ERRONEOUS ADMISSION OF IDENTIFICATION EVIDENCE
REQUIRES A NEW TRIAL BECAUSE APPELLEE CANNOT SUSTAIN
ITS BURDEN OF PROVING THAT IT WAS HARMLESS ERROR.

Since the decisions of the Supreme Court in the Wade, Gilbert and Stovall cases, the courts have further developed the law with respect to the issue of the procedural consequences of a finding that identification evidence was improperly admitted. When the evidence was improperly admitted for the reason that the identification was not in the presence of defense counsel, it is clear

that the defendant is entitled to a new trial unless the Government is able to sustain its burden of convincing the appellate court that the error was harmless under the new standard of Chapman v. United States, 386 U. S. 18, 24 (1967) -- i.e., of convincing the court that it is "able to declare a belief that it was harmless (error) beyond a reasonable doubt". See Clemens v. United States, supra, Slip Opinion, p. 4, also the opinion of Wright, J. at p. 39. While the Supreme Court did not reach the issue in Stovall, having found no violation of due process, it is equally clear since Clemens that where identification evidence has been improperly admitted not because of lack of counsel but because it was obtained under suggestive circumstances amounting to a denial of due process of law, the same approach must be taken -- the Government must in such situation meet the stringent test of Chapman; see Clemens v. United States, supra, Slip Opinion, p. 30, also the opinion of Wright, J., at p. 39.

As set forth under Argument Headings I-A and I-B above, identification evidence was improperly admitted in this case. It is appellant's position that the Government cannot meet the burden of proving these errors harmless.

In applying the Chapman test in identification cases, this Court has stated that it must "look at all the evidence, defense and prosecution alike, and bring our judgment to bear on the question whether it is clear to us beyond a reasonable doubt that a guilty verdict would have resulted even if the jury had never

heard the challenged testimony". Taylor v. United States, ____ U. S. App. D. C. ____, ____ F. 2d ____, (decided May 15, 1969, Slip Opinion, p. 4). In his concurring opinion in Taylor, Judge Wright pointed out that " * * * where the jury's deliberations are infected by identification testimony produced by police procedures lacking in due process, it is realistically impossible, simply by reading the record, to determine with assurance beyond a reasonable doubt that the jury, or at least one juror, was not influenced by the limited evidence". (Slip Opinion, p. 5) In the Taylor case, both the majority and Judge Wright concurring agreed that no remand was necessary, it appearing that there was highly credible evidence identifying appellant as the perpetrator of the crime by two witnesses, policemen, who were not involved in the allegedly defective pre-trial identifications and who gave clear and convincing independent testimony linking appellant with the crime.

In the case at bar, the only clear and direct evidence of substance which might have linked appellant to the crime was the pre-trial and in-court identifications of the witnesses Ahalt, Gaul, Singletary and Brooks.^{5/} But, as demonstrated above, all of this

^{5/} See Harrington v. California, ____ U. S. ____, 37 U. S. L. Week 4472 (June 2, 1969), in which the Supreme Court, in holding the error in that case to be harmless error, pointed out that the case against the petitioner "was not woven from circumstance evidence". Here, apart from the evidence improperly admitted, the case against appellant was entirely circumstantial.

evidence was improperly admitted. Moreover, it is submitted that the identifications by the bank employees were so inconclusive as not to afford any real substantiation of the Government's burden of proof under the Chapman rule. Under those circumstances, it is submitted that there was no properly admitted evidence which established appellant as the perpetrator of the crime, with the result that the Government has not and cannot convince this Court that "a guilty verdict would have resulted even if the jury had never heard the challenged testimony". Taylor v. United States, supra.

II. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT FEAR FOR THE SAFETY OF THE VICTIM'S FAMILY, AS OPPOSED TO FEAR FOR THE SAFETY OF THE VICTIM HIMSELF, SATISFIED THE "PUTTING IN FEAR" REQUIREMENT OF THE ROBBERY STATUTE.

(With respect to this Argument, appellant desires the Court to read Tr. M, pp. 87-89; K, pp. 1045-1046, 1053-1054; B-3, pp. 242-244, 259-260, 260-262, 281-282.)

An essential element of robbery under Title 22, Section 2901 of the District of Columbia Code (1967) is that the taking is accomplished by force or violence or "by putting in fear". At the close of the Government's case, appellant moved for judgment of acquittal on the ground, among others, that the Government had not made out a prima facie case since its evidence did not show force or violence and, as regards putting in fear, related only to threats of harm to members of Ahalt's family without a showing that Ahalt was put in fear for his own personal safety. (Tr. M, pp. 87, 88) The trial court denied the motion. (Tr. M, p. 89) In its instructions

the court charged the jury that fear for the safety of one's family would satisfy the statutory requirement. (Tr. K, pp. 1045, 1046) Trial counsel for appellant objected to this instruction, but his objection was overruled. (Tr. K, pp. 1053, 1054)

While there is little law on the subject, it seems clear that the "fear" involved in robbery does not include threats of harm to members of the family unless the robbery statute so provides.

"The 'fear' involved in robbery is the fear of immediate injury to one's person or to one's property * * *. By statute the common law is frequently expanded to include fear of future as well as immediate harm and to include threat of harm directed to members of the victim's immediate family and to persons closely related or associated to him in some way." Wharten's Criminal Law and Procedure (1957), Volume 2, Section 557

As indicated in the treatise, a number of states have robbery statutes which specify the threat of harm directed to members of the victim's family. ^{6/} Since no such language appears in the District

^{6/} See, for example, New York Penal Law, Section 2120 (prior to its amendment in 1965), "Fear of injury * * * to his person or property or the person or property of a relative or member of his family, or anyone in his company at the time of the robbery"; Minnesota Statutes, Section 619.41 (prior to the enactment of the Criminal Code of 1963), referring to threat of future harm "to relatives and members of the family"; California Penal Code, Title 8, Section 212, "Fear" may be either "The fear of an unlawful injury to the person or property of the person robbed, or any relative of his or member of his family" or "The fear of an immediate and unlawful injury to the person or property of any one in the company of the person robbed at the time of the robbery"; and each of the following, almost identical to Section 212 of the California Penal Code: Arizona Criminal Code, Title 18, Section 642; Idaho Code, Title 18, Section 6502; Oklahoma Statutes Annotated, Title 21, Section 794.

of Columbia Code definition of robbery, it follows that only fear for one's own person satisfies this requirement of the robbery statute. Accordingly, the judge's failure so to limit the evidence and his instructions were error. That the error was prejudicial is demonstrated by the fact that the evidence with respect to fear of personal danger was extremely limited and extremely vague. (Tr. B-3, pp. 242, 243, 259, 260, 281, 282) While the witness Ahalt referred to the possible presence of a gun, no evidence of such a weapon was ever introduced. Moreover, Ahalt had ample opportunity himself to escape from any threat of personal force from the person who robbed the bank. (Tr. B-3, pp. 260-262) Thus his actions, as well as his testimony, make clear that he was motivated by the threat to his family.

III. THE TRIAL COURT'S INSTRUCTION ON ENTERING WITH INTENT TO ROB OMITTED AN ESSENTIAL ELEMENT OF ROBBERY, NAMELY, FORCE OR VIOLENCE OR PUTTING IN FEAR.

(With respect to this Argument, appellant desires the Court to read Tr. K, p. 1041.)

In submitting to the jury the first count of the indictment, entering the bank with intent to rob, the trial court instructed the jury on the elements of that crime. His entire instruction on these elements was as follows (Tr. K, p. 1041):

"Now, the essential elements of this offense, each of which the Government must prove to your satisfaction beyond a reasonable doubt are:

1. That the Defendant entered the premises of the bank, that is where the bank does business;

2. That at the time of such entry the Defendant acted with the specific intent to commit robbery, that is, to take from the person or from the presence of another any property or money or other thing of value belonging to or in the custody or in the care or the control or the management of the bank".

Under common law, under the robbery portion of the Federal Bank Robbery Act and under Title 22, Section 2901 of the D. C. Code, robbery requires, as an essential element, that the taking be by force or violence or by putting in fear. No hint of this essential element is found in the trial court's instruction. The absence of any reference to so vital an element in the crime is "plain error" requiring reversal by this Court even though not objected to below, Rule 52(b), Fed. Rul. Crim. Proc.

It cannot be argued that this omission was cured by the instructions on the crime of robbery itself. While it is true that these latter instructions included the element of force or violence, they were deficient for another reason, as set forth in Argument II above. Accordingly, the jury was never given a complete and proper instruction of the elements of robbery. Under such circumstances, appellant is entitled to a new trial.

- IV. HAVING BEEN CONVICTED OF ROBBERY, APPELLANT COULD NOT ALSO BE CONVICTED OF UNLAWFUL ENTRY UNDER 18 U.S.C. Sec. 2113(a). HIS SENTENCE UNDER THAT CONVICTION SHOULD THEREFORE BE VACATED.

(With respect to this Argument, appellant desires the Court to read Tr. K, p. 1060, and the Judgment and Commitment, filed January 27, 1969.)

Appellant was convicted of entering a bank with intent to commit robbery (18 U. S. Code, Section 2113(a)), the Federal Bank Robbery Act, and robbery (22 D. C. Code, Section 2901), and was sentenced to four to twelve years on the entering charge, and three to twelve years on the robbery charge, the sentences to run concurrently. (Tr. K, p. 1060; Judgment and Commitment, filed January 27, 1969)

In Prince v. United States, 352 U. S. 322 (1957), the Supreme Court held that the crime of entry into a bank with intent to rob was not intended by Congress under the Federal Bank Robbery Act to be a separate offense from the consummated robbery. The Court pointed out that "the heart of the crime is the intent to steal" and that this "mental element merges into the completed crime of the consummated robbery". In Heflin v. United States, 358 U. S. 415 (1959), the Court stated, with reference to Prince, "We ruled that entering with intent to steal, which is 'the heart of the crime', id., 358 U. S. at 328, 'merges into the completed crime if the robbery is consummated'".

In Prince, both the entry with intent charge and the robbery charge were based upon provisions of the Federal Bank Robbery Act whereas, in the case here, the entry with intent charge was

based upon that Act and the robbery charge upon the D. C. Code provision. But the language of the decision in Prince as well as the reasoning which led to that decision make clear that the same result must apply. What the Supreme Court decided in Prince was simply that Congress in enacting the unlawful entry provision of 18 U. S. Code, Section 2113(a) intended it to apply only to "the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime", 352 U. S. at 298. It follows that if the person who entered the bank was not so frustrated and did complete the crime which he intended to commit at the time he entered the bank, no conviction will lie under 18 U. S. Code, Section 2113(a). In this case, the only crime which appellant has been found to have intended at the time he has been found to have entered the bank was robbery under 22 D. C. Code, Section 2901. Accordingly, under Prince, having been found guilty of that crime, he cannot also be guilty of entering the bank with an intent to commit it. Hence, his sentence under 18 U. S. Code, Section 2113(a) should be vacated by this Court.

It is true that a number of courts have taken the position that Prince did no more than prescribe the pyramiding of sentences and that, where a person is convicted under the Federal Bank Robbery Act both of entering the bank with intent to rob and of larceny, the trial court may impose sentence on either one, but not both, of the two charges. See Smith v. United States, 356 F. 2d 868 (8th Cir. 1966)

and cases cited at p. 872 thereof. Appellant submits that the decisions of the courts in the cited cases are not in accord with the Supreme Court's decision in Prince and should not be followed by this Court. See Smith v. United States, 287 F. 2d 270 (9th Cir. 1961), cert. den. 366 U. S. 946; United States v. Di Canio, 245 F. 2d 713 (2nd Cir. 1957), cert. den. 1355 U. S. 874; and dissenting opinion in Purdum v. United States, 249 F. 2d 822 (10th Cir. 1957), cert. den. 355 U. S. 913, at p. 828.

Even under the cases limiting the scope of Prince, only one sentence may be imposed and hence, even under those cases, the action of the trial court in imposing two sentences, though to run concurrently, was erroneous. ^{7/} At the very least, therefore, this case should be remanded for determination by the trial court of which the two sentences are to be imposed and for vacating the other sentence.

^{7/} In this connection, see United States v. Machibroda, 338 F. 2d 947 (6th Cir. 1964), at p. 949:

"The sentences for robbery are the longer ones, but we cannot dismiss this appeal as frivolous, since this court has previously held: '(I)t is well understood that a multiplicity of sentences impairs a prisoner's opportunities for pardon or parole'. Hibdon v. United States, 204 F. 2d 834, 839, 37 A. L.R. 2d 1130 (C.A. 6, 1953)."

CONCLUSION

For the reasons set forth in Arguments I, II and III herein, appellant urges that his conviction on counts one and three of the indictment be reversed and the case remanded for a new trial. In the event this relief is not granted, appellant urges, for the reasons set forth in Argument IV, that his conviction on count one of the indictment, for entering a bank with intent to commit robbery (18 U. S. Code, Section 2113(a)) be reversed and his sentence thereon be set aside.

Respectfully submitted,

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ADDENDUM

Statutes and Rules Involved

18 United States Code, Section 2113(a), provides:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny --

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both".

22 District of Columbia Code (1967), Section 2901, provides:

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years".

Rule 52(b), Federal Rules of Criminal Procedure, provides:

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court".

REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
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No. 22,737

UNITED STATES OF AMERICA

v.

WATSON W. STIPP, Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 17 1969

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REPLY BRIEF FOR APPELLANT

I. The Government's response to Argument IA of Appellant's Brief.

Appellant contended that the pre-trial identification of appellant by Ahalt was unfairly suggestive and that its admission in evidence was error. The Government contends that the identification was not unfairly suggestive, and that, in any event, its admission in evidence was not prejudicial because there was an in-court identification which had an independent source. In reply, appellant submits:

(1) The Government does not deny the factual circumstances, outlined on pages 28-30 of appellant's brief, which appellant contends were unfairly suggestive. Rather than attempting to show why these circumstances were not unfairly suggestive, the Government for the most part ignores them. Moreover, as to one important circumstance, the Government states that Ahalt "selected appellant as the suspect" prior to his being taken to appellant's table. As pointed out in appellant's brief (p. 28), no positive identification was made until after Ahalt had been taken to appellant's table under circumstances which were suggestive.

(2) The ~~ex~~istence of an independent source for an in-court identification is relevant only where an in-court identification alone is admitted into evidence, the independent source serving to eliminate the taint which the improper pre-trial identification would otherwise have caused. But the existence of an independent source for an in-court identification is not relevant where, as here, the improper pre-trial identification itself is also admitted in evidence. Hence the Government's analysis in footnote 8 of its brief is faulty - the correct rule is as stated in the first sentence on page 32 of appellant's brief and in the two cases cited therein.

II. The Government's response to Argument IB of Appellant's Brief.

Appellant contended that the pre-trial photographic identification was made without the protection of counsel and was unfairly suggestive, and that its admission in evidence was therefore error.

The Government contends that the identification was not suggestive. It further contends that this court should not adopt a per se exclusionary rule with respect to photographic evidence obtained outside the presence of counsel and after arrest, and, therefore, that the absence of counsel was irrelevant. In reply, appellant submits:

(1) Once again, the Government does not deny the factual circumstances, outlined on pages 35-37 of appellant's brief, which appellant contends were unfairly suggestive, but ignores them.

(2) On the issue of a per se exclusionary rule on photographic evidence obtained outside the presence of counsel after arrest, appellant submits that the reasons for such a rule, set forth on pages 33-36 of his brief, should lead this court to adopt such a rule. While United States v. Bennet, 409 F. 2d 888 (2d Cir. 1969), cited by the Government, holds to the contrary, appellant refers the court to the opinion of Judge Winter in United States v. Marson, 408 F. 2d 644 (4th Cir. 1968, and to "Criminal Procedure-Photo Identification", 43 N.Y.U. L. Rev. 1019 (1968), both of which are extremely persuasive in support of the view urged by appellant.

III. The Government's response to Argument II of Appellant's Brief.

Appellant contended that fear for the safety of one's family did not satisfy the "putting in fear" requirement of the D. C. robbery statute. The Government contends appellant's reliance upon Wharton's treatise in support of his contention is error because the D. C. statutory provision is not the common law. In reply, appellant submits:

(1) The D. C. statutory provision for robbery is the same as the common law definition but for one expansion not here relevant - see United States v. Mann, 119 F. Supp. 406, 407 (D.C.D.C. 1954); Irby v. United States, 250 F. Supp. 983, 988 (D.C.D.C. 1965).

(2) The importance of Wharton and the common law is to demonstrate that those legislatures which desired to broaden the common law definition so as to include fear for the safety of one's family did so expressly by including such language in their robbery statutes, and that no such language was included in the D. C. statute.

IV. The Government's response to Argument III of Appellant's Brief.

Appellant contended that the trial court's instruction on the unlawful entry count omitted an essential element of the crime. The Government contends that the omission was cured in the instructions relating to the robbery count. In reply, appellant submits, as in his brief (page 43), that since the instructions on the robbery count were improper, for the reasons set forth in Argument II of appellant's brief, those instructions could not cure the omission in the instructions on unlawful entry.

V. The Government's response to Argument IV of Appellant's Brief.

Appellant contended that, under Prince v. United States, 352 U. S. 322 (1957), having been convicted of robbery, he could not also be convicted of unlawful entry under 18 U.S.C. Sec. 2113(a). The Government contends that the conviction for robbery of Ahalt under the

D. C. Code was "something apart" from the conviction for bank robbery under the U. S. Code, so that the Prince rule would not apply, and, further, that the issue need not be decided because the sentences for unlawful entry and robbery were concurrent. ^{1/} In reply, appellant submits:

1. The two robbery counts of the indictment read as follows:

"SECOND COUNT:

On or about June 23, 1967, within the District of Columbia, Watson W. Stipp, by force and violence and by intimidation, took from the person and presence of James B. Ahalt, \$40,000.00 in money, belonging to and in the care, custody, control, management and possession of the American Security and Trust Company, a body corporate, City Office Branch, the deposits of which are insured by the Federal Deposit Insurance Corporation.

THIRD COUNT:

On or about June 23, 1967, within the District of Columbia, Watson W. Stipp, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of James B. Ahalt, property of the American Security and Trust Company, a body corporate, City Office Branch, of the value of about \$40,000.00, consisting of \$40,000.00 in money".

^{1/} The Government also contends that it withdrew the second count of the indictment (robbery under 18 U.S.C. Sec. 2113(a) because the trial judge ruled it objectionable "under the Prince rationale". Appellant submits that a fair reading of what transpired (see Tr. H-923-925) provides no basis whatsoever for such a contention.

2. The second part of the document focuses on the implementation of these practices. It details the steps involved in setting up a robust system for data collection and analysis. This includes identifying the key areas of focus, selecting appropriate tools and techniques, and establishing clear protocols for data handling and reporting. The goal is to create a streamlined process that minimizes errors and maximizes the efficiency of the data collection process.

3. The third part of the document addresses the challenges associated with data collection and analysis. It acknowledges that there are many obstacles, such as limited resources, time constraints, and the complexity of the data itself. However, it also provides practical solutions and strategies to overcome these challenges. For example, it suggests using automation to reduce manual data entry and implementing regular audits to ensure data integrity.

4. The final part of the document concludes with a summary of the key findings and recommendations. It reiterates the importance of maintaining accurate records and provides a clear roadmap for the future. The document also includes a list of references and a glossary of terms to ensure that all readers have a clear understanding of the concepts discussed.

These two counts are virtually identical; they clearly make no distinction whatsoever between a taking from the person and a taking from the bank. Moreover, the U. S. Code provision is essentially the same as common law robbery. See People v. Candelaria, 139 Cal. App. 2d 432, 294 P. 2d 120 (1956).

2. The fact that the sentences for unlawful entry and robbery were concurrent does not dispose of appellant's contention that the sentence for unlawful entry should be vacated. In the first place, appellant contests the validity of the conviction for robbery as well. Moreover, the concurrent sentence doctrine, set forth in Hirabayashi v. United States, 320 U. S. 81 (1943), relied upon by the Government, has no applicability where, as here, the sentence under attack is for a longer period than the allegedly valid concurrent sentence. It should also be noted that the Hirabayashi doctrine has been questioned in the very case cited by the Government, Benton v. Maryland, 37 U.S.L.W. 4623, 4624-4625 (decided June 23, 1969).

3. Additional support for appellant's basic contention concerning the effect of the Prince case is found in this court's recent decision in Bryant v. United States, No. 21,863, decided August 7, 1969.

Respectfully submitted,

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